No. 13444.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

Respondent.

BRIEF ON BEHALF OF RESPONDENT PAPPAS AND COMPANY.

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BRIEF ON BEHALF OF RESPONDENT PAPPAS AND COMPANY.

Statement of the Case.

Facts Bearing on Jurisdiction of National Labor Relation Board.

Respondent, Pappas and Company, is a California cor poration engaged in farming. It is not engaged in an business but farming [Tr. p. 73]. Its farm lands ar located in Fresno County, California, six to nine mile southwest of the town of Mendota [Tr. p. 73]. Whil Mendota is referred to in the transcript as a "city," th

last United States Government Census (1950) shows it to have a population of 1,516. An examination of an atlas shows the town to be located on the west side of the San Joaquin Valley, a vast area containing but a few small, widely scattered towns. Pappas and Company farms approximately 3,500 acres in this area [Tr. p. 74], growing cotton, melons and grain.

The cotton and grain grown by Pappas and Company are not put through a packing shed. The cantaloupe and persian melons, however, immediately following their picking, are hauled by trucks and trailers operated by employees of Pappas and Company [Tr. p. 81] to its packing shed at Mendota [Tr. p. 73] where they are sorted and packed in crates [Tr. p. 82]. The Southern Pacific Railroad has constructed, at the expense of Pappas and Company, a spur track to the packing shed [Tr. p. 75] and the packed crates of melons are placed on railroad cars and iced by the Union Ice Company right at the shed or at the team tract some 100 to 200 yards away [Tr. p. 83]. All of the packing shed personnel are employees of Pappas and Company [Tr. p. 81].

Melons are one of the most perishable crops grown. When they are ready for harvest, they must be picked, packed, placed under refrigeration and started to market immediately, or they will deteriorate to the point where they will have no economic usefulness to the grower. This has long been recognized by the United States Department of Agriculture in its pamphlet on growing of melons,

more extended excerpts from which are set forth in the appendix to this brief. In part, this pamphlet states:

> "After picking, cantaloupes should be hauled without delay from the field to the packing shed, where they should be kept in the shade until packed. They should be packed as soon as possible, and, while being hauled from the packing shed to the car-loading platform, should be covered with canvas or other light-colored cloth to protect them from the sun. As soon as possible, after packing, cantaloupes should be loaded into iced refrigerator cars for shipment."

Pappas and Company handles and packs in its packing shed only melons which it grows. It does not pack melons for or make purchase of melons from any other grower. The transcript of the record on this point reads as follows:

> "Q. Does the company make any purchase of melons from any other grower? A. No.
>
> Q. They receive their melons only from the land that is owned by them is that right? A. That is right." [Tr. p. 84.]

Of the 3,500 acres farmed by the employer respondent approximately 700 to 800 acres are in melons which must be packed [Tr. p. 74].

The value of the land being farmed by the employer respondent is worth in excess of $200,000.00, the value of the packing shed and its equipment is worth about $25,000.00. The cost of the spur track to the packing shed was approximately $3,000.00 [Tr. pp. 74-75].

The farming operations of Pappas and Company go on the year around [Tr. p. 75]. The packing shed operations continue only from mid July to the middle or end of October, during the melon harvesting season [Tr. p. 78].

There is a peak of 100 persons employed in the farming operations [Tr. p. 77], and a peak of about 60 persons engaged in packing [Tr. p. 82].

Pappas and Company packs only the melons it grows and no processing of the melons takes place. The melons are sorted and packed in creates and the crates are then lidded and loaded into refrigerator cars [Tr. pp. 82-83]. The transcript of the record on this point reads as follows:

> "Q. Is there any washing done on the melons at all? A. No. No washing.
>
> Q. Anything done to the melons? A. No." [Tr. p. 83.]

Questions Involved.

The questions involved in this Petition for Review are: (a) Does the National Labor Relations Board have jurisdiction in this matter and (b) If the Board does have jurisdiction, is there any substantial evidence to support the finding of the Board that Ramey was discharged?

ARGUMENT.

I.

The National Labor Relations Board Does Not Have Jurisdiction of This Matter.

A. Pappas and Company Is Engaged Only in Agriculture

A melon grower must pick, haul, pack and sell his melons as one continuous operation in order to make the enterprise a profitable one. The packing and selling are necessary incidents to the growing and picking.

All agriculture is hazardous, but none exceeds the risks entailed in growing, picking, packing and selling cantaloupes and persian melons. Pappas and Company, during the period in question, had a melon crop worth from $400,000.00 to $450,000.00 [Tr. p. 83], but that entire crop could be lost by a single break in any link of the chain of picking, hauling, packing and selling. The grower does not realize any return on his investment until all of these operations have been safely and properly completed, and as pointed out by the Department of Agriculture in its pamphlet on the subject (see appendix) the return to the grower is directly dependent upon the speed and continuity with which all of these tasks are performed.

It is meaningless to say to the farmer, "we are mindful that there are special reasons which exclude your operations from the purview of the statute," and at the same time adopt a definition of the agricultural exclusion which bisects his operations and holds part to be excluded and part to be subject to the Act.

In this case, we have a situation where one labor union which has since "folded its tents and crept silently away"

(and now even the Board appears unable to locate it or effectively enforce its order against it) was willing to call a work stoppage to force one employee in sympathy with another union to pay dues. The most that the union could have lost by this arbitrary position was a few days' employment by its members. What the grower stood to lose was a $400,000.00 melon crop. This situation highlights the wisdom of Congress in excluding "agriculture," by broad definition, from labor regulations applicable to other industry. But, to make that exclusion effective, it must apply to *all* of the agricultural operations of the farmer and not to just a part of them. His agricultural operations do not end until he has harvested, prepared for market and sold the agricultural products which he has grown.

B. Agriculture Has at All Times Been Excluded From the Act.

Section 2(3) of the National Labor Relations Act and also of the Labor-Management Relations Act of 1947, excludes from the term "employee," and therefore from the provisions of the Act "any individual employed as an agricultural laborer." (29 U. S. C. A., Sec. 152 (Subsec. 3).)

By the National Labor Relations Board Appropriation Act enacted July 26, 1946 (and identical limitations in the Appropriation Acts for each year thereafter), Congress has defined the extent of the agricultural exclusion from the National Labor Relations Act as follows:

> "Provided, further, that no part of the funds appropriated in this title shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, direc-

tives or orders concernings bargaining units composed of agricultural laborers as referred to in Section 3(f) of the Act of June 25, 1938 (52 Statutes 1060)."

At the present time, the "National Labor Relations Board Appropriation Act of 1953" contains this limitation on the use of funds (Act of July 5, 1952, Public Law 452, 82nd Congress, Second Session).

Section 3(f) of the Fair Labor Standards Act of 1938 (which has not been amended since its enactment), reads as follows:

> " 'Agriculture' includes farming in all its branches and among other things it includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations), performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

C. The Intent of Congress in the Appropriations Act Was to Broaden the Agricultural Exclusion.

Congress, in 1946, had been dissatisfied for some time with the narrow definition of "agriculture" used by certain governmental agencies, including the National Labor Relations Board, in defining the agricultural exclusion from the acts which they were administering. In 1945, Congress had placed a limitation in the Appropri-

ations Act for the War Labor Board requiring that in excluding agriculture from its jurisdiction the Board use the definition contained in the Social Security Act as amended in 1939. (For a discussion on this point, see the Congressional Record for 1946, pp. 6679 to 6689.)

The National Labor Relations Board Appropriations Act of 1946 was a part of the Independent Offices Appropriations Bill. The bill was first introduced into the House on June 11, 1946 (Congressional Record for 1946, p. 6679.) Representative Elliot of California thereupon offered an amendment providing that no funds should be used in connection with agriculture as defined in the Social Security Act, Section 409 (Title 42, U. S. Code) (Congressional Record for 1946, p. 6689). In support of this amendment, it was stated:

> "This amendment is much needed at the present time in the interest of protecting the processing, handling and production of food stuffs of all kinds on the farms. We all know that we need some clarification in defining agriculture and harvesting and processing in order to properly protect agriculture at this particular time." (Congressional Record for 1946, p. 6689.)

The Elliot amendment was passed by the House, being supported by Phillips, Lea and Anderson, all of California, who stated that it was needed to protect agriculture (Congressional Record for 1946, p. 6689). The amendment was rejected by the Senate. The bill then went to joint conference and was reported back with the House and Senate still in disagreement on this amendment.

When it was reported back to the House, Representative Harness, speaking in support of the Elliot amendment, stated:

> "But there are, in my district and state . . hundreds of smaller processing and packing plan which are in full operation only a few weeks eac year during the harvesting season. These plants a totally non-industrial in all but the most technic sense of this court interpretation. They are almo as truly a direct incident of agricultural productio as the actual harvest in the fields, or the transport tion of produce from field to plant." (Congre sional Record for 1946, p. 9147.)

The matter then again went to joint conference whe it was determined to keep the limitation in the Appr priations Act, but to define the agricultural exclusion terms of Section 3(f) of the Fair Labor Standards A of 1938.

The second conference report went back to the Hou and was accepted without debate (Congressional Reco for 1946, p. 9494).

In the course of the Senate debate on the second joi conference report, the following questions and answe were given:

> "Mr. Pepper: Is the preparation for mark which is exempted that preparation for market whic is carried out on a farm or as an incident to a farm ing operation?
>
> Mr. McCarran: Mr. President, I will say to th Senator that that is the construction the committe put upon it." (Congressional Record for 1946, p 9514.)

The second joint conference report was adopted by the Senate on July 23 and was signed into law by the President on July 26, 1946.

The same limitation in the Appropriations Act for the National Labor Relations Board has appeared each year since 1946.

This court in *National Labor Relations Board v. Thompson Products Co., Inc.,* 133 F. 2d 637 (9th Cir., 1944), states:

> "That Congress can amend substantive legislation by provisions in an Appropriations bill is not questioned. *United States v. Dickerson,* 310 U. S. 554, 555."

In this instance, it is quite apparent from the statements of those Congressmen in charge of the bill that they intended to make a substantive change in the National Labor Relations Act by this limitation in the Appropriations bill. This is further substantiated by the fact that Congress has each year since then re-enacted the limitation in the then current Appropriations Bill, thereby evidencing an intent that this be a permanent part of the legislation. This position is still further substantiated by the House conference Report on the Joint Conference agreement reached on the Labor-Management Relations Act of 1947. In this report, it is stated:

> "The conference agreement in general follows the provisions of the Senate amendment with the following exceptions:
>
> (A) Since the matter of the 'agricultural' exemption has for the past two years been dealt with in the Appropriation Act for the National Labor Relations Board, the conference agreement does not disturb existing law in this respect."

D. Court Cases Interpreting "Agricultural Laborer" a Exempt From the Act Prior to July 26, 1946.

Since there has been an apparent substantive change i the agricultural exemption from the National Labor Rela tions Act and the Labor Management Relations Act afte July 26, 1946, this brief has been divided to discuss th cases bearing on the agricultural exclusion from the Ac (a) under the Act as it existed prior to the limitation i the National Labor Relations Board Appropriations Ac of July 26, 1946, and (b) after this limitation had gon into effect. It is our position, however, that the labo here involved is agricultural labor both under the Act a it existed before and after July 26, 1946.

The case decided under the law as it existed prior t July 26, 1946, which is practically identical on its fact with the instant one, is *National Labor Relations Boar v. Campbell,* 159 F. 2d 184 (5th Cir.). Although thi case was decided January 2, 1947, it discusses the agri cultural exemption as it existed in general language prio to the adoption of Section 3(f) of the Fair Labor Stand ards Act. The facts in the *Campbell* case are stated b the court at page 185, as follows:

> "Respondent is extensively engaged in growin tomatoes on a farm of approximately 1,000 acre near Goulds, Florida, and as an adjunct to which it operates its own packing house wherein the prod ucts of its farm are washed, graded and packed fo market.
>
> The growing and packing of tomatoes is seasonal They are highly perishable, admitting of little dela in gathering, packing, shipping and marketing.

> With the exception of a short time at the end of the packing season in 1944, the respondent had never engaged in the packing of any agricultural products except those grown on its farm."

Based on these facts, the court goes on, at page 187, to hold as follows:

> "Congress, as well as this court, has recognized that the packing and preparing of agricultural products for market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces, and so long as the operation of washing, packing and preparing for market by employees of the farmer is on that only which he has produced on his farm, it is a necessary incident to farming and is agricultural labor."

The court, in the *Campbell* case, rejected the argument that the size of the operation made it commercial instead of agricultural and at page 187 states as follows:

> "The argument that respondent has 1,000 acres planted in tomatoes and grows, packs and markets many carloads in a season, and because of the very nature and size of its operations, should be held to be engaged in an industrial enterprise, as distinguished from the pastural pursuits of the farm, will not do. The exemption was not restricted to the 40-acres-and-a-mule farmer. It is not measured by the magnitude of his plantings nor in the prolificacy of his harvest."

The cases of *North Whittier Heights Citrus Association v. National Labor Relations Board,* 109 F. 2d 76 (1940); *National Labor Relations Board v. Tovrea Packing Co.,* 111 F. 2d 626 (1940), and *Idaho Potato*

Growers v. National Labor Relations Board, 144 F. 2d 295 (1944), decided by this court, are not relevant to the facts in this case.

North Whittier Heights Citrus Association v. National Labor Relations Board, 109 F. 2d 76 (cert. den., 310 U. S. 632, 84 L. Ed. 1402, 60 S. Ct. 1075), involved the packing of oranges by a cooperative association which was a separate corporate entity from the growers, created for the purpose of marketing their fruit. At page 80 the court states:

> "The packing house activity is much more than the mere treatment of the fruit. When it reaches the packing house, it then is in the practical control of a great selling organization. . . ."

The *North Whittier Heights Citrus Association* case is consistent with other Federal cases, cited under the Fair Labor Standards Act's agricultural exclusion, to the effect that a cooperative association is a separate legal entity from the growers or farmers that compose its membership. (See Annotation in 170 A. L. R. 1250 for similar cases interpreting the agricultural exclusion under the Fair Labor Standards Act.)

In *National Labor Relations Board v. Tovrea Packing Co.,* 111 F. 2d 626, the court, at page 627, states that:

> "Respondent is engaged in the general meat packing business. It purchases, feeds, slaughters, processes, and markets livestock."

In the *Tovrea* case, the employees involved were employed in the feeding mill, adjacent to the packing plant, which

fed mainly purchased stock. On this point, the court, at page 628, states:

> "Most of the stock fattened on the ranches is not marketed in any way through the packing plant, and most of the stock fattened in the feeding pens adjacent to the packing plant comes to it from sources other than the ranches to which reference has been made."

Under these circumstances, the court held that the feeding mill was incidental to the packing plant and its operation rather than incidental to the farming or ranching operations of respondent.

Idaho Potato Growers v. National Labor Relations Board, 144 F. 2d 295 (cert. den., 323 U. S. 769, 89 L. Ed. 615, 65 S. Ct. 122), involved a group of respondents, none of which came within the category of a grower preparing for market only the potatoes which he himself has grown. The court described the business of the respondents as follows:

> "All of the respondents except the Traffic Association, being herein at times called respondent dealers, are dealers in potatoes in Idaho Falls, Idaho, and vicinity. The respondent dealers, except the Potato Growers, customarily buy lots of potatoes from other dealers and farmers in the vicinity, and pack, load, ship and resell them. The respondent Potato Growers being a cooperative enterprise does not buy the potatoes in which it deals but ships them for the account of farmers, both members and non-members, and of other dealers with all of whom it ordinarily makes final settlement at the end of the season."

In other words, in the *Idaho Potato Growers* case, all o the respondents either came within the type of operatio discussed in the *Tovrea Packing Co.* case or within th type of operation discussed in the *North Whittier Height Citrus Association* case. None of them came within th type of operation discussed in the *Campbell* case.

It is quite obvious that the facts in this case brin it within the rule of *National Labor Relations Board v Campbell,* 159 F. 2d 184, and that the facts in the *Nort Whittier Heights* case, the *Tovrea Packing Co.* case an the *Idaho Potato Growers* case are at variance with th facts in the instant case.

E. National Labor Relations Board Cases Interpretin "Agricultural Labor" as Exempt From the Act Prior t July 26, 1946.

While the courts prior to July 26, 1946, made the dis tinction between a farmer merely packing or preparin for market the produce which he himself had grow and the packing of such produce by another, either afte purchase or for the account of the farmer, the Boar failed and refused to make such a distinction. The case of *American Fruit Growers, Inc.* (1938), 10 N. L. R B. 316, and *Averill* (1939), 13 N. L. R. B. 411, involve groups of respondents some of whom were commercia packers of lettuce and others of whom merely packe what they grew. The Board held *all* such packing labo to be non-agricultural, stating that the packing was no performed as an incident to the farming operations bu as a commercial operation. Apparently, in the case o the packing of the lettuce by those who packed only wha they grew on their own farms, the Board held the packing

to be commercial because it was incidental to the selling of the produce. Apparently, under this strange reasoning, when the farmer sold what he grew, he ceased to be engaged in agriculture and became engaged in a commercial enterprise.

As pointed out in Section C of this brief, this strained and limited definition of agriculture used by the Board resulted in Congress, in 1946, forcing the Board into a more reasonable and adequate definition of agriculture by placing a limitation of power in the Appropriations Act.

F. National Labor Relations Board Cases Interpreting "Agricultural Laborer" as Exempt From the Act After July 26, 1946.

Since July 26, 1946, the Board has followed a vascillating policy in defining agricultural labor and agriculture as excluded from the Act. This vascillating policy can be illustrated no better than by quoting from the Board's own decision, *In the Matter of Imperial Garden Growers, Employer, and Fresh Fruit and Vegetable Workers, Local Union No. 78, Petitioner,* Case No. 21-RC-1183, 91 N. L. R. B. 1034, decided October 18, 1950. This case involved packing shed labor engaged in packing lettuce which the farmer grew. In determining whether this constituted agricultural labor as excluded from the Act, the Board states:

> "In a number of cases decided under the Wagner Act before July, 1946, the Board directed representation elections among the packing shed employees of fruit or vegetable packers engaged in operations similar to those of the employer. This continued to be the Board's practice until, in July, 1946, a rider to

the Board's Appropriation required the Board to de fine 'agriculture' as defined in Section 3(f) of th Fair Labor Standards Act. The Board then modifie its policy. Thus, although the Board continued t assert jurisdiction over packing shed workers wh were engaged in packing produce not grown by thei own employer, or where the processing materiall changed the product to enhance its market value, ceased by 1948, to assert jurisdiction over packin shed workers where neither of these factors wa present.

"In the present case, we have reconsidered and re evaluated these later decisions, and have considere the interpretation of Section 3(f) of the Fair Labo Standards Act by the Wage and Hour Division o the Department of Labor."

After discussing the tests used by the Administrator i determining whether certain activities constituted agricu tural labor under Section 3(f) of the Fair Labor Stand ards Act, the Board thereupon concluded that it had bee wrong in its decisions between 1946 and 1950, and fo all practical purposes, went back to the position which had taken prior to the 1946 Appropriations Act.

The question now arises, was the Board correct in it interpretation of agriculture which it used between 194 and 1950 or is it correct in its present interpretation This, in turn, in our opinion, depends upon the prope interpretation of Section 3(f) of the Fair Labor Stand ards Act and upon the pursuasiveness to this court o the interpretation of 3(f) of the Fair Labor Stand ards Act made by the Wage and Hour Administrato in his "Interpretive Bulletin No. 14." We will proceed to discuss these points.

G. What Is Meant by the Term "Agriculture" as Defined in Section 3(f) of the Fair Labor Standards Act.

(1) Analysis of the Definition.

Section 3(f) of the Fair Labor Standards Act of 1938 has not been amended since the Act was first passed. It has been quoted in full under Section B of this brief. At this point, we simply wish to analyze the portion of the definition applicable to the facts in this case.

The portion of the definition applicable to the facts in this case is the so-called secondary portion of the definition which includes as agriculture:

> "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market . . ."

It will be first noted that this portion of the definition is stated in the disjunctive in order to make it as broad as possible. The practices may be performed by a farmer *or* on a farm. If the practices which are exempt are performed on a farm, they need not be performed by the farmer; on the other hand, if the practices which are exempt are performed by the farmer, they need not be performed on the farm. The practices must be carried on as an incident to *or* in conjunction with such farming operations. We read the purpose of this last disjunctive provision as one to broaden the definition. In some instances, there may be a question as to whether a given practice is performed "as an *incident* to" the farming operation, but if it is performed "in conjunction with" the farming operation, then it is agricultural. Congress, by this definition, gave every evidence of its intent that it be broadly construed and that certain words could

not be seized upon in order to limit its construction
In the instant case for example, we have no doubt bu
what the melon packing is carried on as an incident t
the farming operation, but there can be no doubt in an
one's mind that it is carried on in conjunction with suc
farming operations. Webster defines "conjunction" a
an act of conjoining; union; association; combination; c
as concurrent, as of events. In other words, the packin
must be carried on in union or association or combinatio
or in concurrence of time with the farming operatio
The facts in this case show that this is done and the fac
set forth in the United States Department of Agricultu
Bulletin, quoted from in the appendix to this brief, sho
that this must be done if the farmer is to have a marke
able crop.

(2) Administrator's Interpretation of the 3(f
Exemption as Contained in His Interpretativ
Bulletin No. 14.

"Interpretative Bulletin No. 14" of the United State
Department of Labor, interpreting "agriculture" as ex
empt from the Fair Labor Standards Act, was issued i
December, 1940, and has not been revised since that tim
Copies of this Interpretative Bulletin obtained from th
United States Department of Labor have stamped on th
cover the following statement:

> "This document represents the view of the Admin
> istrator as of the time of its issuance. Because c
> subsequent court decisions, statutory changes, . .
> it may not at the present time."

At page 5 of this Bulletin, he takes up "practices . . . performed by a farmer." On this point, he says, in part, as follows:

> "The agricultural exemption, however, would seem to include only practices which constitute a subordinate and establish part of the farming operations. Factors that would indicate that the practices performed by a farmer are thus subordinate would be, among other things, that most of the employees engaged in such practices are normally employed also in farming operations on the farm, and that these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business."

In other words, the Administrator in effect states that if the packing is done other than by general farm labor, it is not agricultural. If it is done by persons who do not interchange with the farm labor, it is done by persons who are engaged in a special occupation or special trade and it therefore does not constitute agriculture and they are not engaged in agricultural labor.

It is upon this interpretation that the National Labor Relations Board now relies in holding labor such as this and as in the *Imperial Garden Growers* case (*supra*) not to be in agriculture.

(3) The Legal Effect of Administrator's Interpretative Bulletin No. 14.

In *Skidmore v. Swift & Company,* 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), the court, at page 140, had this to say regarding the weight to be given the Administrator's interpretation of a particular provision of the Fair Labor Standards Act:

> "The weight of such a (the Administrator's) judgment in a particular case will depend upon th thoroughness evident in his consideration, the validity of its reasoning, its consistency with earlier and late pronouncements, and all those factors which give i power to persuade, if lacking power to control."

In *Jewell Ridge Coal Corporation v. Local No. 6167* 325 U. S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534, the cour held that the position of the Administrator being legall untenable, it would not be given the respect to which i is usually entitled. In the final analysis, the Administra tor's interpretation is entitled to no more consideratio than its persuasiveness justifies.

(4) The "Special Trade" Limitation Placed on Agriculture in Interpretative Bulletin No 14 Is Not in Harmony With Court Decisions

One of the earlier cases on this point is *Miller & Lux Inc. v. Industrial Accident Commission,* 179 Cal. 764, 178 Pac. 960, 7 A. L. R. 1291 (1919). The single questio for decision was stated by the court, at page 766, to be "whether or not a workman whose sole duty is to repai wagons in a shop operated on a farm for the purpose o keeping the agricultural implements and vehicles used i the farm in order, is engaged in farm or agricultura labor within the meaning of" said Act. At page 767 the court states:

> "The law of California has exempted the farming industry from the operation of this statute, and i a worker on a farm may be reasonably classified as one engaged in agriculture, his employer is clearly entitled to the benefit of this exemption. While it is true that an employer may be engaged in several sorts

> of industry, some of them within and some without the purview of the Compensation Act, and that an employee may at different times do work of one kind or the other, it is equally a fact that where from the great extent and complexity of farming operations on a given rancho, the work of the farmers is classified and each is given a limited, rather than a diversified duty, that circumstance alone will not make some of them artisans rather than agriculturalists."

A more recent California case on the subject is *Irvine Co. v. California Employment Commission,* 27 Cal. 2d 570, 165 P. 2d 908 (1946). In this case, the respondent owned and operated a large ranch of which some 97,000 acres were used for farming purposes. At page 573, the court states the facts as follows:

> "To facilitate its work of preparing the land for cultivation, raising and marketing crops, maintaining buildings and equipment, and keeping records, respondent has for greater efficiency, arranged a division of labor by assigning special duties to certain of its employees."

Then, at page 581, the court goes on to hold as follows:

> "Moreover, and as an independent consideration, it is a settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity, must be regarded as having had in mind the actual conditions to which the Act will apply; that is, the customs and usages of such industry or activity. At the time the Unemployment Insurance Act was adopted in this state in 1935, there were many large ranches producing agricultural crops by the employment of mechanized equipment, *with a division of labor,* and by using irrigation, reclamation and drainage. When, then, the legisla-

ture, in adopting the language of the Act, created a exception by the use of the general term 'agricul tural labor,' it must have had the large ranches i mind as well as the smaller farms; and while the bas words are not defined in the Act, they are also no limited, so that it is unreasonable to suppose that i was intended to narrow the exemptions to small farm or to hand labor or to any particular part of th labor then being generally used on ranches and farm by the owners or tenants thereof. . . .

Agriculture, like industry, has developed, changed and grown under modern conditions incident to th adoption of new methods and the advent of improve machinery, including the use of electrical power an the internal combustion engine. This has also brough about, in some cases, changes in the methods an ways of doing the necessary work in carrying o agricultural operations. While, of course, there sti exists the small farm operated mainly by hand labo and horse drawn implements, the use of power ma chinery and more varied equipment is now genera on large and medium sized farms and to some exten even on smaller farms. A large part of agricul tural production takes place on large farms, the effi cient operation of which would, in many instances have been impossible a generation ago, and whic systematically utilize modern methods and machin ery. But, despite such changes in methods an means of operations, they are still agricultural en terprises and are operated for the purpose of produc ing agricultural crops. It may fairly be said tha the determinative consideration here is whether th act in question contemplated 'agricultural labor' unde the conditions then actually existing and well know to the legislature, and as broadly applying to th

business of agriculture in its entirety, or whether the general exemption was intended to be limited to 'agricultural labor' under primitive conditions or as pursued a century or more ago, and to apply only and so far as those conditions and methods may still survive. Reasonably viewing the generality of the term, it would seem that it was intended to cover and apply to the conditions prevailing when the Act was adopted and under which agriculture now flourishes throughout the state." (Emphasis added.)

Under the Social Security Act, as it existed before the 1939 amendments, agriculture was exempted from the Act without definition. A definition of the exemption was contained in Regulations 90 and 91 of the Treasury Department. These regulations contained a "special trade" provision excepting special trades from the agricultural exemption. (Federal Bureau of Internal Revenue Rulings, 127 S.S.T. 125, C.B. 1937-1397; 423 S.S.T. 368, C.B. 1939-1 part 1298.) But, in three federal cases where the question of classification arose with reference to services performed during those years, it was held that persons employed by farmers and for farm purposes were engaged in agricultural labor even though it might properly be said that they were pursuing special trades. These cases were *Jones v. Gaylord Guernsey Farms,* 128 F. 2d 1008; *Stuart v. Kleck,* 129 F. 2d 400; *Latimer v. United States,* 52 Fed. Supp. 228.

In *Jones v. Gaylord Guernsey Farms,* 128 F. 2d 1008 (1942), the defendant, Gaylord, operated an 800 acre dairy farm and in connection therewith employed persons to feed and milk the cows, to cool and bottle the milk and to sell the milk by retail routes. The court stated that the term "agricultural labor" must be given

an interpretation "broad enough to embrace agricultur as that term is understood wherever the calling is fol lowed." The court said there were two tests to deter mine whether certain work constituted agricultural la bor—(1) the nature of the services rendered, and (2) the dominate purpose. It held in that case that the domi nant purpose was the operation of a large dairy farm and that all of the labor above mentioned was inciden thereto and exempt, despite the contention by the Com missioner that it was a "special trade."

In *Stuart v. Kleck,* 129 F. 2d 400 (9th Cir., 1942) the employees were engaged in leveling land and con structing dams and reservoirs for impounding water Even though this was all specialized work, the employee using large pieces of machinery and equipment, it wa all held to be agricultural labor.

In *Latimer v. United States,* 52 Fed. Supp. 228, th court had before it various classifications of labor b four different plaintiffs. One of these plaintiffs wa Rancho Sespe, a California corporation, which operated 4,100 acre ranch in Ventura County. The court, at pag 236, held that the carpentry, mechanical and blacksmith work and repair and maintenance of machinery an equipment in connection with growing, transporting t the packing house and packing fruit, were all exempt a agricultural labor, despite the contentions of the Com missioner that they were specialized occupations. Th court used the same test as in the *Gaylord* case, namely

that the dominant purpose and business of Rancho Sespe was farming citrus products and the correlated activities in connection therewith, carried on by the employees of Rancho Sespe, were also agricultural labor.

From the above cases, it is obvious that the courts have refused to recognize the distinction made by the Administrator in his Bulletin 14 and have consistently held that the fact that an employee has specialized duties in connection with the farming operations, does not prevent such an employee from being engaged in agriculture.

H. The Courts Have Consistently Held That the Term Agriculture and the Definition of Agriculture as Contained in Section 3(f) of the Fair Labor Standards Act Are to Be Broadly Construed.

The courts have consistently held that the term "agriculture" is one of broad import to be broadly construed. In *United States v. Turner Turpentine Co.*, 111 F. 2d 400, 404-405, the court stated that when Congress used the term "agricultural labor" it:

> "intended (the term) to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the Act operates . . ."

When Congress itself has defined "agriculture" in a statute, the definition has been broad, as in the Fair Labor Standards Act and the Social Security Act. The courts have recognized the intent of Congress in these definitions and have broadly interpreted them as exclusions from the

Act. In *Waialua Co. v. Maneja,* 178 F. 2d 603 (1949, 9th Cir.), certiorari denied 339 U. S. 920, 94 L. Ed. 1343, 70 S. Ct. 622, this court discussed the broad exclusion of agriculture from the Fair Labor Standards Act contained in Section 3(f) of that Act. In *McComb v. Hunt Foods, Inc.,* 167 F. 2d 905 (1948, 9th Cir.), certiorari denied 335 U. S. 845, 93 L. Ed. 395, 69 S. Ct. 69, this court quoted from the opinion of the lower court as follows:

> "The policy of protection to the growers of 'perishable and seasonal fresh fruits' is of as much force as that of the protection of the general industrial workers. The objective of the uniform rule for hours and wages in manufacturing should not be allowed to prevail over the paramount necessity of garnering and preserving fruits and grains and the protection of those who grow them when Congress equally recognized both in the Act."

The court then, at page 908, goes on to state:

> "We agree with the conclusion of the trial court that the 'remedial' provision applies to the activities excepted by the statute to the same degree and in as full measure as those which by their nature were intended to be brought in their entirety, within the orbit of the statute, if it is made clear by the evidence that the claim of exception is supported by adequate proof. In such a case, the act is 'remedial' as to the activities claimed and proven to be excepted, and its remedial provisions inure to the benefit of those shown to be engaging in such excepted activities."

In *Damutz v. Wm. Pinchbeck, Inc.,* 158 F. 2d 882 (1946, 2d Cir.), 170 A. L. R. 1246, it was stated that Section 3(f) of the Fair Labor Standards Act was in-

tended to cover much more than ordinary farming activities. At page 883, the court states:

> "It (the statute) is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activities."

The courts have consistently held that when a farmer packs or prepares for market only the produce which he has grown, such labor constitutes agricultural labor. This statement of law is set forth in an Annotation in 170 A. L. R. 1250, as follows:

> "Where an employer's business regularly involves the handling of, or other work in connection with, commodities grown by others, those activities are not a practice incidental to farming even though the handling of his own grown commodities would be incidental to his farming operations. (Cases cited.)
>
> Contrarywise, employees' handling of, or other work in connection with, commodities grown by the employer and not yet placed in transportation, except possibly to carry them to local markets, is regarded as 'employment within agriculture' within the statutory exemption." (Cases cited.)

II.

No Unfair Labor Practice Was Committed by Pappa and Company.

The Trial Examiner found that there was no discharg of Ramey by the company. In his Intermediate Repor the Trial Examiner states:

> "Hamilton refused every demand made on him b representatives of the F. T. A. to discharge Rame and to reinstate Yokas in his place." [Tr. p. 48.

The Board, however, found that the respondent em ployer on August 5, laid Ramey off at the instance of th respondent union and on August 7 rejected his reques for reinstatement [Tr. p. 26]. Member Reynolds dis sented from the opinion of the Board and adopted th recommendation of the Trial Examiner [Tr. p. 36].

There is no substantial evidence to support the findin of the Board that Ramey was discharged by the employe either on August 5 or August 7.

Ramey's own testimony on the subject is as follows He was first employed by the company on Wednesday August 2, 1950 [Tr. p. 84]. On Friday, August 4 Feller of the F. T. A. Union came around for a "bool inspection" (*i.e.,* to collect dues) [Tr. p. 87].

Both Feller and Cunningham of the F. T. A. Unior came around on Saturday, August 5, regarding dues and were unable to collect from Ramey [Tr. pp. 88-89].

Sometime before 4:00 P. M., Saturday, August 5th work stopped in the packing shed and Ramey, who worked on the outside, went in to see what had happened He heard Feller say, "Well, this is the reason we called this shutdown—there's a man working outside that don't

even belong to the Union" [Tr. p. 91]. This led to a fracas and name calling between Ramey and Feller. Ramey went on to testify:

> "Well, they insisted that Hamilton give me my check and pay me off. He said 'no, I don't think that is right.'" [Tr. p. 91.]

After more conversation, Hamilton stated that he thought Ramey had as much right to work as anybody [Tr. p. 92], and Ramey walked out and started back to work on the outside. Thereupon, Hamilton came out and said to Ramey:

> "The boys refuse to go back to work until you are off the shed so you might as well take off. I will go ahead and pay you for the rest of the day and I hope something will develop and you will go back to work over the weekend." [Tr. p. 93.]

This was about 4:00 P. M. and Ramey would normally work until about 5:00 P. M.

The shed did not operate on Sunday [Tr. p. 120], so the next working day was Monday, August 7th.

Monday morning, Ramey arrived at the shed about 7:00 A. M. before work had begun, in the company of Mr. Gillie and Mr. Crabtree, both representatives of the C.I.O. Union that was backing Ramey in the jurisdictional dispute. Ramey testified that he was told to go down there at that time to see, "if I am still on the payroll" [Tr. p. 95].

The packers refused to go to work while Ramey was on the shed and he was so informed by Hamilton and thereupon Ramey stated:

> "I am getting off. I don't want to cause any trouble."

He thereupon turned and left the shed and does no know what went on after that [Tr. p. 97].

He waited until the regular payday for his check and then went down and got it [Tr. p. 97].

Prior to Ramey leaving the shed, however, Gillie had asked Hamilton, in Ramey's presence, "Is this man fired or discharged?" Hamilton had answered, "He was neither" [Tr. p. 102].

Hamilton testified regarding the events resulting in the alleged illegal discharge as follows:

He was the shed foreman for Pappas and Company [Tr. p. 112]. On Saturday, August 5th, about the middle of the afternoon, Chuck Feller asked Hamilton if he couldn't get rid of this Ramey and Hamilton replied he couldn't [Tr. p. 114]. A little later, Duke Cunningham of the same F. T. A. Union made formal demand for discharging Ramey and Hamilton again replied that he couldn't [Tr. p. 115]. When it appeared that the packers were not going to go back to work, Hamilton told Ramey to take the afternon off and he would pay him for that afternoon and in the meantime he would try to get it settled. So Ramey left and the packers went back to work [Tr. p. 117].

Monday morning, August 7, Ramey was present and the crew refused to go to work if he was on the job. So Ramey said, according to Hamilton: "If they don't want to work, well, I will leave, I will leave the shed. I won't cause any trouble." [Tr. p. 119.]

We submit that there is no substantial evidence to support the Board's finding that Ramey was discharged on Saturday, August 5th.

Hamilton testified that although he was importuned and pressured to discharge Ramey, he consistently replied that he could not.

Ramey testified that, "They insisted that Hamilton give me my check," but he did not. When Ramey was paid, he was paid on the regular payday [Tr. pp. 91 and 97].

It is the law in the State of California, and this law is well known to working men, that when a man is discharged, he must be paid his check immediately. This is so well known to working men that it has become common parlance for the foreman in discharging employees to say "Go into the office and get your check," instead of, "You are discharged." That is why the F. T. A. Union officials were insisting that Hamilton give Ramey his check. Strong evidence against the fact of a discharge then exists in the evidence that (a) Hamilton at all times refused to then and there give Ramey his check, (b) Ramey did not demand his check, thereby evidencing stronger than words that he did not consider himself discharged, and (c) Ramey, although he was being advised by his C.I.O. representatives, did not, either on Saturday, or Monday, demand his check but waited to be paid on the regular pay day which is the usual procedure when a man quits his job.

The Board has further stated that if Ramey was not discharged then at least the employer knowingly permitted the exclusion of an employee from the plant and this was a violation of the Act. This contention is answered by the statement of the Trial Examiner in his Intermediate Report, where he says:

> "If Ramey had not volunteered to leave his employment, rather than cause trouble, but had stood

> on his right to remain unmolested on his job, and the respondent company had required him to leave, or had refused to afford him such protection as was necessary to secure him in that right, a different situation might be presented, though it is difficult to see what the company could have done short of closing down its plant." [Tr. p. 49.]

In other words, Ramey did not force the company into the position of having to protect him as an employee. Perhaps he could have done that. Instead, let it be said to his credit, he chose to leave voluntarily rather than to put the company in the unenviable position where it would have to close down its packing shed in order to protect his employment status.

In closing, we must protest the dictatorial decision of the Board that, "It was the duty of the company to take effective action to assure Ramey that he would be protected in his right to remain at work." [Tr. p. 27.] Take what action? Close down its packing shed and lose a $400,000 melon crop? This situation graphically underscores the wisdom of Congress in excluding agriculture from the jurisdiction of the National Labor Relations Board.

Fortunately, however, in this case, Ramey did not force the employer to the requirement that he lose his melon crop in order to protect him in his job. Before Ramey would do that, he was willing to leave the packing shed and not force the employer to discharge him or protect him in his job.

Respectfully submitted,

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APPENDIX.

"More Care Is Needed
in Handling
Western Cantaloupes

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Investigator,
and
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United States Department of Agriculture
Bureau of Markets
Charles J. Brand, Chief

Markets Doc. 9 Washington, D. C. May, 1918

Cantaloupes Should Be Loaded Into Iced Refrigerator Cars As Soon As Possible After Picking.

The reduction of serious market losses from oversoft, overripe, and decayed cantaloupes is dependent to a large extent upon the promptness with which they are placed under refrigeration. The importance of prompt loading and cooling is generally recognized. The inspection data of experimental shipments of Pollock cantaloupes from the Imperial Valley to New York City during the seasons of 1916 and 1917 strongly emphasize this factor.

Table 3 gives the average results of inspections of 13 shipments of comparative lots delayed one, four and eight hours before loading during the season 1917.

Table 3.—Average percentages illustrating differences in firmness, color and decay of cantaloupes delayed for one, four, and eight hours before loading into iced refrigerator cars for shipment, season 1917.

Time of inspection at New York City	Just after unloading from refrigerator cars			Two days later.		
Viewpoint of Inspector	Dealer			Consumer		
Time between packing and loading into iced refrigerator car for shipment	1 hr.	4 hrs.	8 hrs.	1 hr.	4 hrs.	8
Cantaloupes:	Per Cent	Per Cent	Per Cent	Per Cent	Per Cent	Pe
Too Soft to be desirable	8.4	16.7	27.0	30.6	37.7	
Too Yellow from standpoint of ripeness	8.4	13.3	15.0	20.9	21.5	
Decayed enough to spoil for food	.0	.0	1.2	2.9	3.3	

After picking, cantaloupes should be hauled without delay from the field to the packing shed, where they should be kept in the shade until packed. They should be packed as soon as possible, and, while being hauled from the packing shed to the car-loading platform, should be covered with canvas or other light-colored cloth to protect them from the sun. As soon as possible, after packing, cantaloupes should be loaded into iced refrigerator cars for shipment."